No. 94-1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU), is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members, founded in 1920 to defend the Bill of Rights. It has long been active in efforts to enforce constitutional and statutory protections against cruel and unusual punishment, and appeared by invitation before the U.S. Court of Military Appeals in *United States v. Curtis*, 32 M.J. 252 (C.M.A.), *cert. denied*, 502 U.S. 1097 (1991), the holding of which is at issue here.

STATEMENT OF THE CASE

The accused, an African-American enlisted man on active duty in the United States Army, was convicted of committing murder, off base and in peacetime. He was sentenced to death after the court-martial found the existence of three aggravating factors. The aggravating factors found by the court-martial are set forth in Rule for Courts-Martial (RCM) 1004,[2] which was promulgated by the President after the military death penalty statute passed by Congress was held to be unconstitutional in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983). This case tests the power of the executive branch unilaterally to supply the missing aggravating factors in that invalidated statute without further congressional action.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] Manual for Courts-Martial, 1984, Exec. Order 12,473, 49 Fed.Reg. 17,152 (1984).

SUMMARY OF ARGUMENT

At issue in this case is the power to define conduct that permits a court to impose a death sentence. The President's promulgation of Rule 1004, insofar as it defines conduct that can justify the imposition of a death sentence, is an exercise of a legislative function within the province of Congress. Congress has not explicitly delegated its authority to enact a military death penalty, and a delegation cannot be inferred, legally or factually. Even if delegation were inferred, there are insufficient guidelines for executive action.

Although the parties and *amici* have briefed this issue, it bears emphasis that the separation of powers is no mere civics lesson or preference of policy, but a fundamental and enforceable principle of this country's system of government. This Court has time and again reaffirmed the "central judgment of the Framers" that separation of governmental powers is "essential to the preservation of liberty," *Mistretta v. United States*, 488 U.S. 361, 380 (1989), and has "not hesitated to invalidate provisions of law which violate this principle." *Morrison v. Olson*, 487 U.S. 654, 693 (1988). The separation of powers not only resists the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power even to accomplish desirable objectives," *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983), but assures that each branch, representing different constituencies, acts within the proper area of responsibility created for it by the framers. "No political truth is certain of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." THE FEDERALIST PAPERS, No. 47 at 324 (J. Madison)(J. Cooke ed. 1961).

In a system where the branches of government are often at odds, the separation of powers is not a mere theoretical concept, but plays a vital practical role in the politics of governance. It not only protects against tyranny, but provides a balance among the pressures and powers inherent in a republican government.

ARGUMENT

I. ESTABLISHING A MILITARY DEATH PENALTY IS A LEGISLATIVE FUNCTION

In the allocation of powers among the three branches, it has been recognized from the earliest days that the definition of behavior that society wishes to punish as a crime is a fundamental legislative function. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). "Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or futility these are peculiarly questions of legislative policy." *Gore v. United States*, 357 U.S. 386, 393 (1958)(citations omitted). *See also United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812)(the legislature must define crimes; there are no common law crimes).

The recognition of legislative power over military crimes is of equally long standing. *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857). *See* 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §1197 at 108 (4th ed. 1873)("The whole power is far more safe in the hands of Congress than of the executive"). *Accord Reid v. Covert*, 354 U.S. 1, 68 (1957)(Harlan, J., concurring). In upholding court-martial jurisdiction over off-base crimes with no service connection, this Court recognized Congress's plenary authority under Article I to establish the procedural and substantive law of the armed forces. *Solorio v. United States*, 483 U.S. 435, 441 (1987). Congress has fully exercised this power, providing in Title 10 of the United States Code a detailed Uniform Code of Military Justice governing the substance and procedures of military criminal law.

This Court's Eighth Amendment decisions have consistently emphasized the peculiarly legislative character of defining behavior that is punishable by death. "The constitu-

tional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards." *Gregg v. Georgia*, 428 U.S. 153, 174-76 (1976)(citing *Gore*, 357 U.S. 386, and *Furman v. Georgia*, 408 U.S. 238 (1972)). It is the legislative branch that, in our system, expresses "the will and consequently the moral values of the people." *Furman v. Georgia*, 408 U.S. at 383 (1972)(Burger, C.J. , dissenting). Justice Powell added that the power to define crimes and set punishments "is the very sort of judgment that the legislative branch is competent to make," *id.* at 418. In exercising that responsibility prior to *Furman*, Congress had enacted a military death penalty for no fewer than fourteen separate offenses, including such peculiarly military crimes as improper use of a countersign (Article 101, 10 U.S.C. §901), and misbehavior by a sentinel (Article 113, 10 U.S.C. §913), as well as for murder (Article 118, 10 U.S.C. §918), and rape (Article 120, 10 U.S.C. §920(a)).

Analyzing the cases on this issue, the Ninth Circuit has concluded:

> If the "will and . . . moral values of the people," [*Gregg v. Georgia*] at 175, 96 S.Ct. at 2926, are particularly important in sentencing decisions, and if specification of punishments is therefore peculiarly a legislative function, then specifying the circumstances under which someone may be put to death must also be a function of the elected representatives of the people. It is for that reason that, in finding Georgia's revised procedures constitutional, the Court emphasized that the guidelines were statutory: "[Under the revised Georgia procedures, the jury] must find a *statutory* aggravating circumstance before recommending a sentence of death." *Gregg*, 428 U.S. at 197, 96 S.Ct. at 2936 (emphasis in original). The Court has thus plainly required that guidelines be expressly articulated *by the legislature* in the statute authorizing the death penalty.

United States v. Harper, 729 F.2d 1216, 1225 (9th Cir. 1984)(emphasis in original). The government itself agreed in *Harper* that the promulgation of aggravating factors is a legislative function:

> The conclusion that the Constitution requires legislative guidelines in death penalty cases is thus inescapable. That is the position not only of petitioner, but also of the government . . . .

Id.

Given this consensus, it is no surprise that this Court in *Gregg* and its companion cases provided that only *legislative* action could remedy defective sentencing plans, or that every one of the thirty-seven states that have reinstituted the death penalty since *Furman* did so by legislative, not executive, action. *See Zant v. Stephens*, 462 U.S. 862, 878 (1983)("Our cases indicate, then, that *statutory* aggravating circumstances play a constitutionally necessary function at the stage of *legislative definition* . . . .")(emphasis added).

The need to keep each branch from encroaching on the others is even greater in the military justice system, where failure to enforce limits can easily lead to "a military branch unchecked by the *legislature* and susceptible of use by an arbitrary *executive* power." *Reid v. Covert*, 354 U.S. at 68 (Harlan, J., concurring)(emphasis in original, footnote omitted).

> If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those sub-

> ject to military trials. Such blending of functions in one branch of the government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

Id. at 38-39 (plurality opinion).[3]

II. CONGRESS HAS NOT DELEGATED ITS AUTHORITY TO ENACT A DEATH PENALTY

This Court has long insisted that "the integrity and maintenance of the system of government ordained by the Constitution" generally forbid Congress to delegate its legislative power to another branch of government. *Field v. Clark*, 143 U.S. 649, 692 (1892). This "non-delegation doctrine," *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); *see Mistretta v. United States*, 488 U.S. at 371, expresses a strong presumption against delegation.

In its decision below, the United States Court of Appeals for the Armed Forces[4] nevertheless held that, in promulgating Rule 1004, the President was acting pursuant to a congressional delegation. Any analysis of that contention must begin with the recognition that, unlike the delegations upheld in *Mistretta v. United States*, 448 U.S. 361 (sentencing commission); or *Morrison v. Olson*, 487 U.S. 654 (special prosecutor); or even those struck down in *I.N.S. v. Chadha*, 462 U.S. 919 (one-house veto); or *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)(industry codes of fair competition), there was no explicit delegation here. Accordingly, any delegation to the President to define capital crimes must be inferred. That difference alone, combined with the presumption against delegation inherent in the nondelegation principle, is enough to defeat a claim of delegation. *See* Point I of Petitioner's Brief, and cases cited therein. We are aware of no decision of this Court upholding a delegation of legislative authority in the absence of explicit congressional action.

There is far more, however, to rebut the argument that Congress here delegated its powers to define capital crimes. Not only was there no explicit delegation, but logic and common sense compel the conclusion that Congress could not even have contemplated delegating its power to define what conduct would subject a defendant to the military death penalty. The Uniform Code of Military Justice was enacted in 1950, over two decades before *Furman* required stricter definitions of capital crimes, and thirty-four years before the President promulgated Rule 1004. It is fantasy to ascribe to Congress the prescience of anticipating *Furman*, *Gregg*, *Matthews* and the need over thirty years later to define capital crimes more narrowly, *and* to attribute to Congress the decision to leave those definitions to another branch of government.

The government has argued that the promulgation of Rule 1004 fell within presidential authority under Article 36 of the U.C.M.J., 10 U.S.C. §836, to prescribe trial procedures. That authority has heretofore always been interpreted to authorize only strictly procedural regulations. "[T]he Court of Military Appeals has indicated its belief that Congress did not and could not empower the President to pro-

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[3] While the military and civilian communities remain different in many respects, *see Parker v. Levy*, 417 U.S. 733 (1974), the U.S. Court of Appeals for the Armed Forces has recognized that, at least with regard to offenses not committed in combat or in violation of the law of war, applying lower standards in capital cases would be inconsistent with the intent of the Eighth Amendment and of Article 55, 10 U.S.C. §855 (which prohibits cruel or [sic] unusual punishment in the military). *United States v. Matthews*, 16 M.J. at 368-69.

[4] The Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces in 1994.

mulgate substantive rules of law for the military." *Parker v. Levy*, 417 U.S. at 785 n.36. *E.g.*, *United States v. Barnes*, 14 U.S.C.M.A. 567, 569 (1964)("Presidential authority in the premises is limited to the promulgation of rules of procedure and modes of proof rather than encompassing matters of substantive law"); *United States v. Smith*, 13 U.S.C.M.A. 105, 119 (1962)("Congress did not delegate to the President the authority to fix substantive rules").

Because of this narrow delegation, the government has been at pains to squeeze Rule 1004 under the "procedural" rubric of Article 36. In fact, Rule 1004 contains both procedural and substantive elements. The procedural portions are found in subsection (b), which is labelled, appropriately, "Procedure," and which deals with requirements of notice, rules of evidence, voting procedures, and the announcement of a verdict. Following the "Procedure" subsection is a separate subsection, labelled "(c) Aggravating factors." That subsection -- the one at issue in this case -- defines what actions or behavior will subject an accused to the death penalty. Only if a court-martial finds beyond a reasonable doubt that the accused engaged in the conduct so defined may it impose a sentence of death.

There is nothing to distinguish the aggravating factors in subsection (c) from other elements of substantive proof. They define the behavior that will subject an accused to a particular punishment -- in other words, they define a crime. Like other elements of a crime, they must be proved beyond a reasonable doubt,[5] and must be the subject of instructions by the military judge.[6] It is therefore no surprise that these definitions of conduct punishable by death are not included in the "Procedure" section of Rule 1004, and are never referred to in the Rules as procedures. That conclusion from the face of the regulation, and from its substance, is reinforced by decisions of this Court, all of which classify aggravating factors in capital sentencing statutes as substantive. *Bullington v. Missouri*, 451 U.S. 430, 433, 438 (1981) (aggravating factors are "substantive standards to guide the discretion of the sentencer," and are distinguishable from "procedural safeguards"); *California v. Ramos*, 463 U.S. 992, 1000 n.11 (1983)(aggravating circumstances are "substantive factors chosen to narrow the class of defendants eligible for the death penalty"); *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984)(sentencing decision is guided by "substantive standards").[7] *See Sawyer v. Whitley*, 505 U.S. __ , 112 S.Ct. 2514, 2522 (1992), defining aggravating factors as "statutory definitions" that, like elements of the crime, "narrow the class of defendants eligible for the death penalty."

Ramos, moreover, relies on *Gregg* in emphasizing the importance of the legislative branch in designating the aggravating factors that will justify the imposition of death. As *Gregg* stressed, the jury must be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." 428 U.S. at 192. *Gregg* furthermore explained that "[t]he deference we owe to the

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[5] R.C.M. 1004(c).

[6] R.C.M. 1004(b)(6).

[7] The government has relied on *Dobbert v. Florida*, 432 U.S. 282 (1977) -- holding that a change in the Florida capital punishment statute is procedural for *ex post facto* analysis -- to suggest that R.C.M. 1004 is a procedural provision. *Dobbert* addressed the type of procedural matter found in subsection (b) of the Rule (transferring the sentencing determination from judge to jury). Such a procedural change is critically different from the substantive addition of aggravating factors found in subsection (c). *See State v. Correll*, 715 P.2d 721 (Ariz.Sup.Ct. 1986)(*en banc*)(distinguishing *Dobbert* and holding a statute listing new aggravating factors for capital sentencing to be substantive). *Accord State v. Jordan*, 440 So.2d 716 (La.Sup.Ct. 1983).

decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" *Id.* at 192 (citations omitted).

The President's other powers with regard to courts-martial are even weaker bases for the promulgation of Rule 1004. Article 56 of the U.C.M.J., 10 U.S.C. §856, provides: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." As is apparent from its legislative history,[8] Article 56 was never intended to authorize the President to define crimes or set standards of conduct that subject an accused to a death sentence. In particular, Article 56 does not grant the President authority to define conduct that is punishable by death. To the contrary, throughout the punitive articles of the Code, Congress reserved to itself the power to authorize death sentences. In each instance where the Code authorizes a death sentence, that sentence is specified in the punitive article itself. Congress never left to the President the power to specify capital punishment under the general authority to sentence "as a court-martial may direct." Thus, while Article 56 provides the basis for promulgation of maximum punishments, it has no application to Article 118, 10 U.S.C. §918,[9] or other capital articles of the Code, where Congress preempted the field by itself specifying the punishment.

It is no answer to say that the President by Rule 1004 is merely setting a limit on the punishment for an offense.

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[8] Uniform Code of Military Justice, Hearings on H.R. 2498 before a Subcommittee of the House Armed Services Committee, 81st Cong., 1st Sess. 565 (1949), *reprinted in* Index and Legislative History, Uniform Code of Military Justice at 1087-89 (1950).

[9] Article 118 of the U.C.M.J. provides for the punishment of premeditated murder.

Rule 1004 *defines* the offense. The lesson of *Furman* and *Matthews* is that Article 118 by itself is inadequate to define a capital crime. The President's actions in defining the narrowing elements of the crime go impermissibly beyond providing a maximum punishment for a crime that Congress has defined.

Although courts have disagreed over *Furman*'s impact on the portions of capital statutes that do not contain death penalty, *compare United States v. Watson*, 496 F.2d 112 (4th Cir. 1973), *with United States v. Shepherd*, 576 F.2d 719, 727-29 (7th Cir. 1978), they are in agreement that *Furman* invalidated any death sentence provisions that did not give the sentencing body direction to "minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. at 189. *See United States v. Kennedy*, 618 F.2d 557 (9th Cir. 1980); *United States v. Shepherd*, 576 F.2d 719; *United States v. Watson*, 496 F.2d 112.[10]

To a degree, the question whether *Furman* "invalidated" Article 118 is largely a semantic one, because *Furman* made clear that the statute was inadequate. Without a clear definition of the behavior that will subject an accused to the death penalty, the statute is missing essential elements, and cannot stand. *See Matthews*, 16 M.J. 354. The determination of what those elements will be is a legislative task.

It is thus apparent that Congress has not delegated to the President the authority to define conduct that is punishable by death. Congress, in fact, has had ample opportunity

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[10] This Court has never directly addressed the survival of pre-*Furman* statutes, and its *dicta* are conflicting. *Compare Furman*, 408 U.S. at 417-18 (Powell, J., dissenting)(Because of the constitutional ruling "numerous provisions of the Criminal Code of the United States and of the Uniform Code of Military Justice also are voided"), *and* 408 U.S. at 412 (Blackmun, J., dissenting), *with Thompson v. Oklahoma*, 487 U.S. 815, 877 n.1 (1988)(Scalia, J., dissenting).

to exercise its power to enact a general military death penalty, and has not done so. Where it has mustered a sufficient political consensus -- as in the case of air piracy (49 U.S.C. §1473); drug racketeering (21 U.S.C. §848); and espionage (Article 106a, 10 U.S.C. §906a) -- it has acted. No such consensus has emerged since *Furman* to reinstate the death penalty for murder under the Code.[11] In fact, in 1985 and 1987, Congress twice considered a bill that would have adopted the aggravating factors in Rule 1004. H.R. 3652, introduced October 30, 1985; H.R. 731, introduced January 22, 1987. Those bills were defeated.

Moreover, in those limited instances where Congress has enacted a federal death penalty, it has often included special safeguards that are noticeably absent in Rule 1004 and that may well have affected Pvt. Loving's trial. For example, in enacting the Omnibus Drug Initiative Act of 1988 Pub.L.No. 100-690, 102 Stat. 4181-4545, Congress provided not only that special jury instructions be given to avoid racial prejudice in sentencing, but that the Comptroller General of the United States formally study and report to Congress on practices in capital cases, to determine the risk of discriminatory application of the death penalty. 21 U.S.C. §848(o). Appellant here did not receive the benefit of any such instruction, or any such study, because Rule 1004 -- purportedly issued pursuant to congressional delegation -- provides for neither.[12] As a result, appellant received less

[11] The Federal Death Penalty Act of 1994, 18 U.S.C. §§3591-98, specifically exempts crimes prosecuted under the U.C.M.J. *Id.* at §3591, note.

[12] The risk of racially disproportionate application of the military death penalty is real. Of the 12 military executions since 1951, 11 were of African-Americans. Six of the 8 defendants now on the military's death row are African-Americans; one is white and one is a native of Guam. "Military Death Row: Separate, Not Equal," Sullivan, Dwight [Major, U.S.M.C.], National Law Journal, Nov. 6, 1995, A19.

protection at trial than if he had committed murder in the course of a continuing criminal drug enterprise. Thus, even if a conclusion were warranted that Congress intended the President to enact *some* death penalty for murder in the military, there is no way of knowing what aggravating factors or other substantive requirements Congress would have the President include, and no basis for concluding that the President's actions are consistent with Congress's unknown intent.

III. ANY CONGRESSIONAL DELEGATION OF AUTHORITY TO ENACT A DEATH PENALTY IS LACKING IN CONSTITUTIONALLY REQUIRED GUIDELINES

This inadequate guidance from Congress not only negates any inference of delegation, but would render any delegation, if inferred, violative of constitutional standards.

Congressional delegation of the power to legislate is constitutional only if Congress provides "sufficiently specific and detailed" guidelines to the executive. *Mistretta v. United States*, 488 U.S. at 374. The proper analysis of delegation issues was set forth in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935):

> [W]e look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.

Applying this test, this Court has upheld delegation to the Federal Sentencing Commission where Congress itself prescribed the system of guidelines to be used, provided

mandatory sentencing ratios, and listed seven specific criteria for categorizing offenses and other guidelines for classes of offenders and offenses. *Mistretta v. United States*, 488 U.S. at 374-77. It has upheld delegation to rate and price administrators within areas of their special expertise, *e.g.*, *Yakus v. United States*, 321 U.S. 414, 425 (1944); and it has upheld delegations accompanied by other specific statutory guidelines, *see, e.g.*, *Field v. Clark* 143 U.S. 649. In each instance -- unlike the circumstances here -- there was no doubt whatsoever that Congress had established a policy, set up a standard, and explicitly delegated specific tasks to another branch of government.

What this Court has never done is uphold a standardless delegation like the one even arguably at issue here. In *Panama Refining*, the Secretary of the Interior prohibited interstate transportation of certain petroleum products. Even though Congress in the National Industrial Recovery Act had expressly delegated such authority to the executive, the delegation was held unlawful because Congress had "declared no policy . . . established no standard . . . [and] laid down no rule." 293 U.S. at 430. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, the Court struck down a code of fair competition promulgated by the President because Congress, despite defining its general purposes, had failed to define "fair competition" or to set up standards for the President to follow in promulgating the code.

Here, there is no evidence that, when the President issued Rule 1004, Congress had even "declared a policy," *Panama Refining*, 293 U.S. at 415, with regard to the death penalty for murder. Certainly, Congress had not "set up a standard" or "required any finding" for a military death penalty for murder -- the other requirements for a constitutional delegation.

The only standard the court below was able to identify was the requirement in Article 36 that the President "shall, so far as he considers practicable, apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts." These words do not even inform the President whether, after *Furman* and *Matthews*, Congress intended to impose the death penalty for violations of Article 118. They certainly do not provide the Executive with any guidelines for enacting aggravating factors, or for determining whether to provide mitigating factors, or even for deciding whether to employ a weighing test or some other standard to evaluate the evidence. These defects doom any argument that Congress has provided the Executive with constitutionally sufficient guidelines to validate a delegation of legislative power.

Finally, this case differs from *Mistretta*, where "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders [was] precisely the sort of labor-intensive task for which delegation to an expert body is especially appropriate." 488 U.S. at 379. Enacting a post-*Furman* death penalty was well within the capacity of thirty-seven state legislatures and of Congress itself. It is not the inability of Congress to pass a death penalty that is at issue here. It is the President's assumption of power to do so where Congress has not.

The lack of a proper delegation is even more significant in the case of military justice, when viewed in the context of this country's historical fear of the concentration of military power in the hands of the Executive. The constitutional power to make regulations for the land and naval forces was given to Congress, not to the President. U.S. Const., Art. I, §8, cl. 14. *See* 2 J. Story, *supra* p.3, §1197 at 108. Concern about the peacetime military power of the executive is especially evident with respect to courts-martial. *Solorio* was premised on an understanding that concerns about the

scope of military jurisdiction were assuaged by legislative control. "The unqualified language of Clause 14 suggests that whatever these concerns, they were met by vesting in Congress, rather than the Executive, authority to make rules for the government of the military." 483 U.S. at 446 (footnote omitted).

To concentrate further power over military justice in the President, by adding the authority to define conduct punishable by death, raises far greater concerns than those raised in *Mistretta*.[13] Reliance on a dubious claim of delegation would create the objectionable "blending of functions in one branch" that this Court feared in *Mistretta* and avoided in *Reid v. Covert*.

[13] "Indeed, had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally . . . had united the power to prosecute and the power to sentence within one Branch." *Mistretta*, 488 U.S. at 391 n.17.

CONCLUSION

The judgment of the United States Court of Appeals for the Armed Forces should be reversed.

Respectfully submitted,

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